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Issue Date: 03 April 2007

Case No.: 2006-ERA-00030

In the Matter of:

OLIVER WILLIAMSON,
Complainant,

v.

WASHINGTON SAVANNAH RIVER COMPANY, LLC
Respondent.

RECOMMENDED DECISION AND ORDER
Granting Respondent's Motion for Summary Decision

These proceedings arise under Section 211 of the Energy Reorganization Act of 1974 (the "ERA" or the "Act"), as amended, 42 U.S.C. § 5851 (1994), and the implementing regulations issued at 29 C.F.R. Part 24.[1] In this case, Oliver Williamson ("Complainant") has alleged that he was retaliated against and ultimately terminated by Washington Savannah River Company ("Respondent") because he raised safety concerns. This case was assigned to me on August 14, 2006, and I issued a Notice of Hearing on August 22, 2006. The case was referred to a Settlement Judge for mediation, but a settlement was not reached. On December 14, 2006, I issued an order updating the schedule for the case and confirming the date, time, and location of the hearing.

On January 29, 2007, Respondent submitted a Motion for Summary Judgment with supporting affidavits and documents, as well as excerpts from a deposition of Complainant. On February 21, 2007, Complainant submitted a response to Respondent's motion accompanied by some supporting documents. On March 11, 2007, Respondent submitted a reply to that response. Based on my review of the parties' pleadings and the attachments thereto, I find, for the reasons discussed below, that Respondent's motion should be granted.

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[1] Complainant also identified the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622, in his original complaint, but as was noted by OSHA, any claim under that statute is time barred. The TSCA requires a whistleblower retaliation claim to be filed within thirty days of the alleged retaliation. In this case, Complainant was discharged on February 22, 2006, but he did not file his initial complaint until March 31, 2006. Thus, any TSCA claim is time barred, and only the ERA claim remains.

Complainant's Complaint

Complainant's original complaint in this case was filed with the Occupational Health and Safety Administration, U.S. Department of Labor, ("OSHA") on March 31, 2006. In that complaint, Complainant alleged that he had engaged in protected activity, including "raising nuclear compliance and safety issues with management and serving as a witness in an investigation that addressed nuclear compliance and safety issues." He also alleged that "respondent and its managers either knew of complainant's protected activity, or suspected him of engaging in protected activity." Finally, he asserted that, in retaliation for his alleged protected activity, Respondent "discriminated" against him, "maintained a hostile work environment," subjected him to "closer supervision," made "false charges that [he] made errors in his work," "downgrad[ed] [his] performance appraisal and status," and ultimately discharged him "on or about February 22, 2006."

OSHA investigated these allegations and, on August 4, 2006, issued Secretary's Findings that concluded Complainant had not been discharged in retaliation for his protected activity. On August 9, 2006, Complainant appealed these findings by requesting a hearing before the Office of Administrative Law Judges, U.S. Department of Labor ("OALJ").

Respondent's Motion

Respondent's Motion for Summary Judgment alleges that Complainant was terminated "because it had evidence that he repeatedly failed to perform an essential safety function of his job or that he had failed to comply with the essential radiological sign-in procedures." Additionally, Respondent asserts that, during an investigation of Complainant's performance, it discovered that Complainant's "work was sub-standard to the point of being unsafe." Specifically, Respondent contends that Complainant either did not do "walk downs" required by his job as a Work Planner or was bypassing the radiological work permit sign-in systems. Additionally, Respondent alleges that Complainant had many deficiencies in his work plans, including some "serious oversights" like failing to note a required safety lockout or needed fall protection.

In support of its position, Respondent has provided excerpts from a deposition of Complainant (RX 1)[2], three affidavits from three of the supervisors in Complainant's management chain (RX 2, 3, 4), copies of Complainant's performance evaluations (RX 5, 6), documents demonstrating Complainant's failure to sign in to certain areas during certain months (RX 7, 8, 9), and other supporting documents (RX 10).

[2] The following abbreviations denote references to the record: Comp. Com. = Complainant's Complaint; Resp. Mot. = Respondent's Motion for Summary Judgment and Memorandum in Support; Comp. Response = Complainant's Response to Respondent's Motion for Summary Judgment; Resp. Reply = Respondent's Reply to Complainant's Response to Respondent's Motion for Summary Judgment; RX = Respondent's exhibits; CX = Complainant's exhibits. Exhibits accompanying Respondent's reply are referenced with "Reply" before the exhibit number.

Complainant's Response

In his response to Respondent's Motion for Summary Judgment, Complainant argues that he was moved to a new area and given a new supervisor as "another form of retaliation." He asserts that one of the areas where he is alleged to have either not performed a walk down or not have signed in correctly "can be viewed from outside the fence." Complainant contends that there is no definition for a walk down, and that he relied upon information provided by those for whom he planned because he was new to the area. He argues that he "hurt no one and hurt nothing even if [he] made a mistake logging in." He also asserts that the process by which his immediate managers reviewed and ultimately terminated him violated Respondent's established employee procedures because he was not given a "required performance evaluation during 2005." Complainant also argues that his supervisor Phillip Moore never informed Complainant of his alleged performance issues. He contends that because he did not receive that evaluation and because he was not otherwise informed of his alleged performance issues, he did not have a fair opportunity to improve his performance. Finally, Complainant argues that he was singled out and fired for actions that "thousands of other employees do" and that the discipline he received "was much greater than the perceived crime."

In support of his response, Complainant has submitted the following: an e-mail from him to someone named Jennifer Garvin (CX 1); a copy of a Notice of Employee Concern submitted by Complainant to Respondent on October 3, 2002 (CX 1); a copy of the Department of Energy's ("DOE") Report of Investigation into a prior retaliation claim Complainant made against Respondent before the DOE (CX 3); a copy of an e-mail from Respondent's president Bob Pedde sent April 7, 2005, concerning the need for mid-year Consolidated Assessment Process (CAP) for all managers and the required mid-year discussion as part of CAP (CX 4); photos showing the view through the fence surrounding one of the areas where he was supposed to have done a walk down (CX 5); a copy of a Decision of Appeal Tribunal from the South Carolina Employment Security Commission from a March 30, 2006, hearing regarding Respondent's obligation to pay unemployment benefits for Complainant (CX 6); a copy of his termination notice (CX 7); a timeline of events he prepared (CX 8); and a CD copy of an audio recording of his hearing before the South Carolina Employment Commission (CX 9).

Respondent's Reply

In its reply, Respondent asserts that Complainant has failed to identify a material issue of fact in dispute or to support his response with factual data. Respondent argues that Complainant fails to cite to admissible documents or sworn statements to oppose summary judgment. Respondent contends that Complainant's allegation that he was not given adequate information about any shortcomings before his termination is both unsupported and irrelevant to the determination of whether his termination was related

to retaliation. In addition, Respondent points to Williamson's deposition where he testified that he was told by his manager that his low rating on the FEP was due to a failure to perform walk downs and the quality of his work packages. Respondent also asserts that Complainant's contention that Respondent failed to conduct a required mid-year review is irrelevant because Complainant's deficiencies were not discovered until after the time the review would have been conducted and the misconduct by Complainant already had occurred. According to Respondent, there was no review due that would have recorded the deficiencies leading to Complainant's termination.

Respondent also contends that Complainant's allegation that he suffered more severe punishment and was treated more harshly is unsupported by any admissible evidence. Respondent argues that Complainant was treated the same as other employees who committed comparable acts. Respondent further asserts that Complainant fails to link his protected activities to his termination and that his new management after his transfer had no connection with his prior whistleblowing. Respondent argues that Complainant's past whistleblower claim should not be considered because the claim was dismissed and there is no evidence that his new management cared about his prior activities. Finally, Respondent asserts that Complainant's reliance upon his award of unemployment by the South Carolina Unemployment Security Commission has no bearing upon this case because the Commission did not make any determination of retaliation.

In support of its reply, Respondent submitted excerpts from Williamson's Deposition (Reply RX 1) and an affidavit from Lorrie Lott, a Senior Human Resource Specialist (Reply RX 2).

Undisputed Material Facts

Based on the evidence of record, I find the facts listed below to be both undisputed and material to this case:

1. Complainant began working at the Savannah River Site in 1978. Resp. Mot.; Comp. Response. He was employed as a "Senior Work Control Planner." RX 1 at 26; RX 2; RX 4; CX 8.

2. In July of 2004 Complainant was relocated to H Area, or H-Canyon Outside. RX 1 at 26; RX 3; CX 8. He previously had been assigned to F Area. RX 3. His relocation to H Area was part of a Performance Improvement Plan ("PIP"). RX 3. Complainant reported to Gerald Czarnecki during his 90-day PIP. RX 3; RX 4. The PIP required Mr. Czarnecki to evaluate in writing Complainant after thirty, sixty, and ninety days. RX 3.

3. The responsibilities of a Work Planner included identifying safety procedures that a job would require, identifying the need for lockouts and fall protection, and walking down projects. RX 1 at 40, 70; RX 2; RX 3; RX 4.

4. In January of 2005, Complainant notified Respondent about open energized conductors that he felt to be a safety issue. CX 8; RX 1 at 35.

5. On April 12, 2005, Complainant and Gerald Czarnecki, the H Area Maintenance Manager, performed a routine Management Observed Evolution ("MOE") of several work packages. RX 3; CX 8. The MOE required Complainant to be signed in on a Radiological Work Permit ("RWP") in order to enter an area known as A Line. RX 3. There is no record that Complainant signed in as required. RX 2; RX 3; RX 7; RX 8.

6. During the April 2005 MOE, Complainant stopped Czarnecki from proceeding after Czarnecki opened a junction box, an act Complainant considered to be unsafe. CX 8.

7. Complainant's Functional Evaluation Process ("FEP") for 2004 gave him 21 points and placed him in the middle 50 percent as compared with his subgroup. RX 5. His 2005 FEP gave him 20 points and ranked him in the bottom 25% as compared with his subgroup. RX 6; see RX 2; RX 4; CX 8.

8. In October 2005, Complainant discussed his concerns about his low 2005 FEP ranking with Phillip Breidenbach, the H Area Project Manager. RX 4. Mr. Breidenbach asked Shannon Bohanan to investigate Complainant's 2005 FEP. *Id*.

9. At Mr. Breidenbach's request, Shannon Bohanan, the H Area Work Planning Control Manager, performed an investigation of issues raised by Complainant after receiving his 2005 FEP ranking. RX 2; RX 4. Based on her investigation, Ms. Bohanan concluded that Complainant's work packages were deficient compared to his peers. RX 2. Ms. Bohanan found that one work package failed to identify the need for a hazardous energy lockout. *Id*. She also found that another work package did not identify the need for fall protection. *Id*. A third work package did not provide a mechanic with a specific setting for a regulator. *Id*. Ms. Bohanan's investigation also revealed three instances when Complainant did not log in on a RWP as required. *Id*. She found that Complainant had no sign-ins during the months of April 2005 or July 2005, months for which Ms. Bohanan believes his work packages necessitated walk downs. *Id*.

10. Complainant was on short term disability due to illness from October 10, 2005, until February 6, 2006. RX 2; RX 4; CX 8.

11. On February 8, 2006, Complainant met with Mr. Breidenbach to discuss Ms. Bohanan's findings from her investigation. RX 1 at 65; RX 4.

12. A Site Disciplinary Committee meeting concerning Complainant was held on February 16, 2006. RX 2; RX 3; RX 4; Reply RX 2. Mr. Breidenbach, Ms. Bohanan, Mr. Czarnecki, and Complainant were present. RX 2; RX 3; RX 4. The Committee

made a unanimous decision to recommend termination of Complainant's employment. RX 2; RX 4; Reply RX 2.

13. Complainant's employment was terminated on February 22, 2006. CX 7; CX 8.

14. From January 1, 2005, through December 31, 2006, Respondent terminated 43 employees for cause. Reply RX 2. Of these 43 employees, seven were terminated for falsification of records and/or dishonest acts. *Id*.

Discussion

Applicable regulations provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 18.40 of the regulations is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107 at 6 (ARB Nov. 30, 1999) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)). The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. *See Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome the summary judgment motion. The nonmoving party may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 248. The Court in *Anderson* explained that the burden on the nonmoving party is to present affirmative evidence in order to defeat a properly supported summary judgment motion. *Id*. at 257. Raising the mere possibility of a factual dispute is insufficient to withstand summary decision. *Gregg v. Allen-Bradley Co*., 801 F.2d 859, 863 (6th Cir. 1986). In this case, Respondent is entitled to summary decision if, on the undisputed record, Complainant cannot establish one or more elements of his case. *See Parker v. Tennessee Valley Authority*, ARB Case No. 99-123 at 3 (ARB June 27, 2002); *Merriweather v. TVA*, 91-ERA-51 (Sec'y Feb 4, 1994).

In consideration of the Complainant's *pro se* status, in my December 14, 2006 Notice of Courtroom Location and Current Case Schedule, I explained to the Complainant the importance of submitting affidavits or other materials in support of his opposition to the Respondent's motion for summary decision. In a two-page section titled *Motions for Summary Decision*, I explained, *inter alia*:

> In deciding a motion for summary decision, the judge will consider all evidence in the light most favorable to the non-moving party, but the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry the burden of establishing there is a factual issue in the case…Rather, the non-moving party must set forth specific facts on each issue upon which he would bear the ultimate burden of proof…Consequently, it is very important that the nonmoving party submit affidavits that specifically set forth the facts of the case, along with any additional supporting materials, because the judge will rely heavily on such documents in determining whether there is a genuine issue of material fact to be resolved in the case.

In the instant case, Respondent has supported its motion with affidavits, excerpts from a deposition of Complainant, and other supporting documents. Therefore, in order to overcome the summary judgment motion, Complainant may not rest upon mere allegations or the pleadings alone, but must go beyond the pleadings to establish specific facts demonstrating a genuine issue for trial. *See Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248; 29 C.F.R. § 18.40(c); Fed. R. Civ. Pro. 56(b).

The ERA's whistleblower provisions are intended to protect employees who raise awareness of safety concerns, and they are to be construed broadly so as to prevent intimidation of employees through retaliation. *DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983). As one court has noted:

> Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment."

Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999) (*quoting Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993)).

The Act prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). The ERA requires a complainant to "demonstrate" that his protected behavior was a contributing factor in the unfavorable personnel action that followed. 42 U.S.C. § 5851(b)(3)(C). "Demonstrate," in this context, means to prove by a preponderance of the evidence. *Dysert v. Florida Power Corp.*, 93 ERA 21, slip op. at 3 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. U.S. Secretary of Labor*, 105 F.3d 607,

609-10 (11th Cir. 1997); *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster Engineering Corp. v. Herman*, 115 F. 3d 1568, 1572 (11th Cir. 1997).

In order to prevail in a whistleblower complaint brought under the ERA, a complainant must prove, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) the respondent took adverse action against the complainant; and (3) the complainant's protected activity was a contributing factor[3] in the adverse action that was taken. *Paynes v. Gulf States Utilities Co.*, ARB No. 98-045 at 4 (Aug. 31, 1999); *Dysert*, 105 F.3d at 609-10. Even if the complainant meets this burden, the employer may avoid liability if it is able to demonstrate by clear and convincing evidence[4] that it would have taken the same unfavorable personnel action in the absence of such behavior.[5] 42 U.S.C. § 5851(b)(3)(D); *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster Engineering Corp*., 115 F.3d at 1572.

Reporting or threatening to report a violation of the Atomic Energy Act of 1954 ("AEA"), the regulations of the Nuclear Regulatory Commission ("NRC"), or the ERA constitutes protected activity. 42 U.S.C. § 5851(a)(1)(A); *Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004 at 10 (ARB Feb. 28, 2006); *see also Mactal v. U. S. Dep't of Labor*, 171 F.3d 323, 329 (5th Cir. 1999) ("A written expression of intent to file a complaint with the NRC falls squarely within [the statutory phrase] 'is about to commence or cause to be commenced' a proceeding under the ERA."). The ERA was amended in 1992 to cover specifically complaints raised to an employer. *See* § 2902(a) of the Comprehensive National Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776, 3123, Oct. 24, 1992 (codified at 42 U.S.C. §5851(a)(1)(A), (B) (1994)).[6]

Protected Activity

The first of the three elements that Complainant must prove by a preponderance of the evidence is that he engaged in protected activity under the ERA.[7] *See Paynes*,

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[3] The "contributing factor" standard is a lesser standard than the "significant," "motivating," "substantial," or "predominant" factor standard sometimes found in case law concerning other statutes prohibiting discrimination. *Van Der Meer v. Western Kentucky University*, 1995-ERA-38 at 4 n.4 (ARB Apr. 20, 1998).

[4] "While there is no precise definition of 'clear and convincing,' the courts recognize that it is a higher burden than 'preponderance of the evidence but less than 'beyond a reasonable doubt.'" *Yule v. Burns Int'l Security Serv*., Case No. 93-ERA-12 at 4 (Sec'y May 24, 1995). As pointed out by the court in *Stone & Webster*, the clear and convincing evidence burden is a "tough" and "high" standard to meet. 115 F.3d at 1572-73.

[5] The respondent's burden to produce clear and convincing evidence that it would have undertaken the same adverse personnel action absent the complainant's protected activity is an affirmative defense that arises only if the complainant proves that the respondent adversely acted against the complainant in part because of his protected activity. *Kester v. Carolina Power & Light*, ARB No. 02-007 at 8 (ARB Sept. 30, 2003). In the instant case, if Complainant does not prove that Respondent took the adverse action against him in part because of his protected activity, there is no need to proceed with a determination of whether Respondent has met its burden. *See id*.

[6] "By expressly extending coverage to internal complaints, Congress effectively ratified the decisions of several United States Courts of Appeals that agreed with the Secretary that the employee protection provision as originally enacted should be interpreted to protect informal complaints raised to an employer." *Williams v. Mason & Hanger Corp*., ARB No. 98-030 at 15 (ARB Nov. 13, 2002) (*citing Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 931-33 (11th Cir. 1995)).

[7] The employee protection provisions at 42 U.S.C. § 5851 provide the following list of protected activities relevant to this case:

ARB No. 98-045 at 4. That Complainant engaged in protected activity is essentially undisputed. *See* Resp. Reply. First, Complainant testified in his deposition that he informed his supervisors of his previously filed retaliation claim before the DOE, and Respondent has not disputed that assertion. RX 1 at 25-26, 28; Resp. Reply. In his response, Complainant provided a copy of the DOE Report of Investigation issued on September 16, 2004. CX 3. The investigation concerned Complainant's allegation of retaliation by Respondent beginning in 2002. *Id*. Reporting a violation of the whistleblower provisions of the ERA is itself protected activity. 42 U.S.C. § 5851(a)(1)(A). Second, the Claimant testified in his deposition that he also engaged in protected activity when he attempted to prevent Mr. Czarnecki from opening an electrical junction box and when he reported exposed wires in electrical conduits with Respondent's Employee Concerns department. RX 1 at 35-38, 58-59. Respondent has not disputed either of these assertions. As discussed *supra*, making internal complaints about violations or potential violations of the applicable statutes or regulations is also protected activity. Both of these actions implicated safety definitively and specifically; therefore, they qualify as protected activities under the ERA. *See Kester*, ARB No. 02-007 at 9 (*citing American Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)). Thus, it is undisputed in this case that Complainant engaged in protected activity of which Respondent was aware.

Adverse Action

Second, Complainant must prove that Respondent took adverse action against him. *See Paynes*, ARB No. 98-045 at 4. As explained by the court in *Stone & Webster*, adverse action is "something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." 115 F.3d at 1573. Complainant argues that his transfer, the PIP, his low FEP ranking, and his termination constitute adverse action taken by Respondent against him. Comp. Com; Comp. Response. Discharging an employee is specifically stated as a prohibited form of discrimination in the ERA. 42 U.S.C. § 5851(a)(1). As Respondent concedes that it terminated Complainant's employment, Complainant has met his burden in establishing adverse action. CX 7; CX 8.

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges or employment because the employee . . .

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 . . .

(D) commenced [OR] caused to be commenced . . . a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended . . .

Contributing Factor

The third element that Complainant must prove by a preponderance of the evidence is that his ERA-protected activity was a contributing factor in the adverse action taken against him. *See Paynes*, ARB No. 98-045 at 4. Evidence that the employer said or did something showing that it sought to retaliate provides direct evidence of retaliatory intent. *Stone & Webster*, 115 F.3d at 1573.

Complainant proffers no direct evidence that his protected activities were contributing factors in any of the adverse actions taken against him by Respondent. In his deposition, Complainant testifies as follows:

> Q: Did you get an indication from anybody in the new management team that they cared one way or another that you had existing retaliation complaints out there?
>
> A. As far as I know I was doing a good job. They – there was nothing communicated to me otherwise.
>
> Q: Okay. I want to make sure I understand or make sure I'm getting the answer to my question. My question was did they say or do anything that would indicate to you that they cared one way or another about your prior retaliation complaints?
>
> A: Not that I'm aware of, no, sir.

RX 1 at 28.; see also RX 1 at 37.

When asked about any retaliation for raising the safety concern of the open conductors, Complainant merely brought up a later, unrelated comment from Shannon Bohanan in which she called him "dogmatic." RX 1 at 35-36. Reference to this comment only appears in Complainant's testimony; he does not cite to it in his complaint or response. *See* Comp. Com.; Comp. Response. This sole, unsupported comment is insufficient to establish retaliatory intent. Complainant could cite no specific examples of retaliation for his raising the concern about the open conductors. RX 1 at 35-38. In addition, he admitted during his deposition that he was "speculating" about whether Czarnecki might be retaliating against him for stopping the work on the open junction box. RX 1 at 38.

Respondent has offered evidence in the form of affidavits that Complainant's managers did not care about his whistleblowing. Gerald Czarnecki stated in his affidavit that when Complainant began reporting to him, he knew no details about Complainant's issues with previous management. RX 3. Similarly, Shannon Bohanan stated in her affidavit that she did not know Complainant before she assumed her position in June 2005, and she did not know of Complainant's previous issues and complainants with previous supervisors. RX 2. Complainant's lack of evidence of any actions or comments by Respondent coupled with his admission of no knowledge of any of his

managers caring about his whistleblowing reveal the lack of any direct evidence of retaliatory intent.

Where direct evidence does not exist, as in most ERA cases, a complainant may present a circumstantial case of retaliation. *Kester*, ARB No. 02-007 at 5 n. 12. Close proximity in time between the protected activity and the adverse action can provide circumstantial evidence of retaliatory intent. *Stone & Webster*, 115 F.3d at 1573; *see also*, *Kester*, ARB Case No. 02-007 at 10 ("retaliatory motive may be inferred when adverse action closely follows protected activity"); *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). Complainant's reporting of the open conductors occurred in January 2005. CX 8; RX 35. The incident in which he stopped Czarnecki from working on a junction box due to a flash shock hazard happened in April of 2005. *Id*. He received his low FEP rating in October of 2005 and was terminated in February 2006. *Id*. Thus, at the very least, six months passed between the incident involving Czarnecki and his low FEP rating. Ten months passed between the Czarnecki incident and Complainant's termination. Complainant's previous whistleblower complaint was filed in October 2003. CX 3. The report of investigation was issued September 16, 2004, and the claim was dismissed in September 2005. CX 3; Resp. Reply. Over two years elapsed between Complainant's filing of the prior claim and his termination. The Supreme Court in *Clark County School District v. Breeden* stated that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" 532 U.S. 268, 273 (2001) (*quoting O'Neal v. Ferguson Constr. Co.,* 237 F.3d 1248, 1253 (10th Cir. 2001)); s*ee*, *e.g., Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (three-month period found insufficient); *Hughes v. Derwinski,* 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (four months found insufficient). As the least amount of elapsed time that can be found between Complainant's protected activity and adverse action is six months, circumstantial evidence of retaliatory intent cannot be established through temporal proximity.

Even though the "contributing factor" standard is a lesser standard than the "significant," "motivating," "substantial," or "predominant" factor standard sometimes laid out in case law concerning other statutes prohibiting discrimination, Complainant still has not met his burden in this case, even through circumstantial evidence. *See Van Der Meer*, 1995-ERA-38 at 4 n. 4. Complainant has failed to introduce any supported facts which tend to establish a relationship between his engagement in protected activity and the adverse employment action taken against him. Instead, Complainant relies upon naked allegations and unsupported theories as to why Respondent took adverse action against him. The case law makes clear that unsupported allegations are insufficient to withstand a summary judgment motion supported with evidence including affidavits.[8] As explained by the Sixth Circuit, summary judgment should be granted

[8] "[L]egal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978); *see also James v. H.M.S. Port Lyttleton Port line Ltd*., 51 F.R.D. 216, 218 (E.D. Pa. 1971) ("statements . . . in briefs and in oral argument are not evidence and consequently such statements cannot

when "the plaintiff is unable to produce sufficient evidence beyond the bare allegations in the complaint to support an essential element of his or her case . . . ." *Mitchell*, 964 F.2d at 582; *see Felty v. Graves-Humphreys Co*., 818 F.2d 1126, 1128 (4th Cir. 1987).[9] In *Sims v. Poe*, the Fourth Circuit found that alleged facts were insufficient to defeat a summary judgment motion because they were unsupported by affidavits in the record. 924 F.2d 1053 (4th Cir. 1991) (unpublished). Similarly, the Fourth Circuit in *Choe v. Smith* found that the plaintiff "was required to produce more than a mere allegation of the existence of a material fact" to withstand a summary judgment motion. 67 F.3d 294 (4th Cir. 1995) (unpublished). The court explained, "Unsupported speculation is insufficient to defeat a motion for summary judgment." *Id*. Thus, Complainant's burden in defeating a properly supported summary judgment motion goes beyond simply asserting a genuine issue exists or proceeding to hearing "with the hope some evidence will be produced at that time, or that his ungrounded suspicions, albeit sincerely held, will be sufficient to defeat a motion for summary judgment." *Trieber v. Tennessee Valley Authority*, 87-ERA-25 at 17 (ALJ Nov. 1, 1989), aff'd (Sec'y Sept. 9, 1993).

Complainant has offered no evidence that Respondent did not follow its normal procedure when it transferred him or required him to complete the Performance Improvement Plan. *See De Ford v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). Further, Complainant has not put forth evidence to establish that his low 2005 FEP rating was due to retaliation. Respondent has provided the affidavit of Ms. Bohanan, an employee in Complainant's management chain, who states that his low FEP ranking was due to a concern that he was not performing walk downs. RX 2. Respondent also puts forth evidence in the form of affidavits that Complainant was informed of the importance of walk downs and what was expected from him.[10] RX 2; RX 3. Mr. Czarnecki stated in his affidavit that he discussed walk downs with Complainant during the formal evaluations conducted as part of Complainant's PIP. RX 3. Ms. Bohanan stated in her affidavit that she held a meeting with Work Control Planners soon after assuming her position in early June of 2005. RX 2. She stated that she stressed the importance of walk downs and conveyed the necessity of viewing a planned job up close by signing into the area and donning the proper protective equipment. RX 2. She stated that viewing a planned job from twenty feet away would never be acceptable when the Work Planner could gain access to the area. RX 2. In addition, Mr. Breidenbach declared that viewing a job twenty feet away from behind a chain would not be a proper walk down. RX 4. Thus, there is no evidence supporting Complainant's allegation that his low FEP ranking was due to retaliation while there is

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be used to create an issue of fact"); *Smith v. Mack Trucks, Inc*., 505 F.2d 1248, 1249 (9th Cir. 1974) (legal memoranda are not evidence and do not establish issues of fact capable of defeating a valid summary judgment motion); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994) (pointing to certain issues of fact in a memorandum without providing evidentiary support is insufficient to defeat a summary judgment motion).

[9] The Ninth Circuit stated, "A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle First National Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *see United States v. Smith Christian Mining*, 537 F. Supp. 57, 64 (D. Or. 1981).

[10] Complainant argues that there is no definition for a walk down. Comp. Response; *see* RX 1 at 40. However, he did concede in his deposition that "[y]ou have to walk the walk-down." RX 1 at 40. He also later agrees in his deposition that a normal walk down would include physically looking at the area. RX 1 at 43.

supporting evidence that the low ranking was due to a failure to complete a required procedure.

Complainant's allegation that he was terminated, in part, for his protected activities also is unsupported. Respondent contends that Complainant was terminated for failing to walk down his projects and/or for bypassing the required sign in procedures. Resp. Mot.; Reply RX 2. In support, Respondent offers the affidavits of employees in Complainant's management chain who state that he was discharged for failing to complete required walk downs and/or for failing to sign in as required and for deficient work packages. RX 2; RX 3; RX 4. The copy of the termination notice provided by Complainant states that he was discharged for "his failure to follow proper procedure by not signing in on an RWP when entering an RBA and a CA." CX 7. In addition to the affidavits of Ms. Bohanan, Mr. Czarnecki, and Mr. Breidenbach, Respondent provides printouts of electronic sign-ins and copies of manual sign-ins that establish that Claimant did not sign in on an RWP. RX 7; RX 8; RX 9. As discussed above, Respondent has offered evidence demonstrating that walk downs are an important and required responsibility of Work Planners, and Complainant concedes that walk downs are necessary. Complainant relies upon only his unsupported assertion that he was not violating Respondent's procedures in failing to walk down properly his projects. He provides no affidavits or other supporting evidence to demonstrate that either his version of the walk down was sufficient or that he completed the walk downs as required.

Complainant's allegation that he was singled out and punished for actions committed by numerous other employees is also unsupported by any evidence.[11] He fails to cite to any examples of employees who failed to walk down their projects, bypassed the required RWP log-in procedure, or had poor work packages, but who were not given low evaluations or were not terminated. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 583-84 (6th Cir. 1992) (a plaintiff must show that she was treated differently from similarly situated employees to make a comparison of discrimination). To succeed on this argument, Complainant would have to produce evidence that he was treated differently from employees who dealt with the same supervisor, who were subject to the same standards, and who engaged in the same conduct. *See id*. at 584. Complainant's allegation of harsher treatment fails to establish retaliation because he offers no evidence of any similarly situated employees. In contrast, Respondent provides seven specific examples of employees who were discharged for acts similar to those for which it terminated Complainant. Reply RX 2. Ms. Lott, a Senior Human Resources Specialist for Respondent, cites to a specific employee who was terminated for failing to properly sign into radiological areas – the same violation for which it purports to have discharged Complainant. *Id*. Thus, Complainant has not established that he was treated more harshly than or differently from employees who committed similar or the same violations.

[11] In his response, Complainant alludes to witnesses that will testify for him. Comp. Response. However, the witnesses are not identified and no information about to what specifically they will testify is provided. Merely alluding to unnamed witnesses without more is insufficient to withstand a summary judgment motions supported by affidavits.

After considering all information related to the issue of "contributing factor," I find that the Respondent has carried its burden of showing that no issue of material fact exists as to whether there is any nexus between Complainant's protected activity and the adverse action. Although an essential element of this complaint, the Complainant has failed to carry his burden of setting forth specific facts from which some genuine issue of material fact could be discerned. Therefore, I find that the Respondent is entitled to summary decision on this issue as a matter of law. Consequently, all other factual issues are immaterial and there can be no genuine issue of material fact. ***Seetharaman v. General Electric. Co.***, ARB No. 03-029, ALJ No. 2002-CAA-21 at 4 (ARB May 28, 2004), *citing* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). Therefore, the Respondent is entitled to summary decision in this case.

As Complainant has failed to present sufficient evidence or specific facts to demonstrate a genuine issue for trial that his ERA-protected activity was a contributing factor in the Respondent's adverse action against him, there is no need to proceed with a determination of whether Respondent would have taken the adverse action in the absence of Complainant's protected activity. *See Kester*, ARB No. 02-007 at 8.

CONCLUSION

Viewing the undisputed facts of record in the light most favorable to Complainant, as I am required to do, I find that he has not established specific facts demonstrating a genuine issue of material fact for trial that his protected activity was a contributing factor in his termination, transfer, PIP, or poor evaluations. As the Tenth Circuit stated in *Trimmer*, "[the whistleblower provisions] are not . . . intended to be used by employees to shield themselves from the consequences of their own misconduct or failures. 174 F.3d at 1104; *see also Stone & Webster Corp*., 115 F.3d at 1574 ("Section 5851 does not protect every act that an employee commits under the auspices of safety"). Complainant has failed to establish that his transfer, poor evaluations, or termination were in any way related to his protected conduct; therefore, his complaint must be dismissed.

RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent's motion for summary decision be GRANTED and Complainant's complaint be DISMISSED.

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington D.C.
WSC:RAG

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. See 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision